

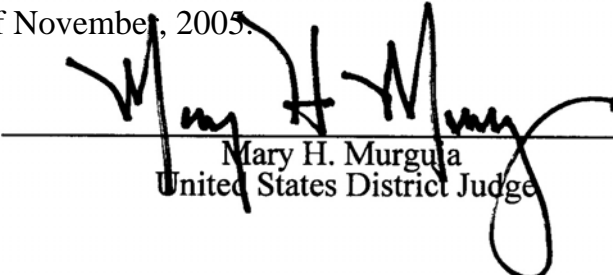


1 Discount Company, 459 U.S. 56 (1982); City of Los Angeles, Harbor Division v. Santa  
2 Monica Baykeeper, 254 F.3d 882 (9th Cir. 2001). Plaintiff argues "the improvident taking  
3 of an appeal cannot effectively destroy the authority of the court below to proceed upon  
4 motions properly before it." Ruby v. Sect. of U.S. Navy, 265 F.2d 385, 388 (9th Cir. 1966).  
5 Plaintiff argues Defendant's appeal is deficient because "denial of a motion to dismiss, even  
6 when the motion is based upon jurisdictional grounds, is not immediately reviewable." Catlin  
7 v. U.S., 324 U.S. 229, 236 (1945). Further, Plaintiff argues the extraordinary writ of  
8 mandamus is not available because the jurisdictional finding depends upon a finding of fact  
9 made upon evidence which is not in the record. In Re Chicago, R.I. & Pac. Ry., 255 U.S.  
10 273 (1921).

11 The Court has considered the parties respective positions. While the Court is aware  
12 that two-years after commencing this litigation, Plaintiff seeks to proceed pass the issue of  
13 subject matter jurisdiction, the Court finds a stay is appropriate. The issue of jurisdiction in  
14 a FMLA case is intertwined with the merits, and therefore, any discovery in this matter  
15 would necessarily implicate the jurisdictional issue on appeal. Further, any contention that  
16 the delay in this litigation is due solely to Defendants is not supported by the record. At a  
17 minimum, Plaintiffs failed to timely raise the issue of the applicable time period under the  
18 FMLA. Additionally, Defendant has averred it will seek a speedy resolution of its appeal.  
19 Finally, the Court would be aided by resolution of whether in the Ninth Circuit the question  
20 of eligible employer status implicates both jurisdiction and the merits, and is properly  
21 reserved for the finder of fact. Morrison v. Amway Corp., 323 F.3d 920, 928 (11th Cir.  
22 2003).

23 **IT IS THEREFORE ORDERED** that Defendant's Motion to Stay this Matter  
24 Pending the Resolution of an Interlocutory Appeal is **GRANTED**. (Dkt. #133). This matter  
25 is stayed pending adjudication of Defendant's appeal of the Court's 9/29/05 Order.

26 DATED this 8<sup>th</sup> day of November, 2005.

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Mary H. Murgula  
United States District Judge